

No. 03-15045

Heard By Circuit Judges A. Wallace Tashima,
Sidney R. Thomas and Barry G. Silverman.
Opinion by Judge Tashima; Dissent by Judge Thomas.
Filed December 28, 2004.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

DARLENE JESPERSEN,

Plaintiff-Appellant,

v.

HARRAH'S OPERATING COMPANY, INC.,

Defendant-Appellee.

On appeal from the United States District Court
for the District of Nevada
Case No. CV-N-01-0401-ECR (VPC)
The Honorable Edward C. Reed, Jr., District Judge.

**PETITION OF DARLENE JESPERSEN FOR REHEARING
AND REHEARING EN BANC**

TABLE OF CONTENTS

Page

Table of Contents	i
Table of Authorities	iii
I. Introduction and Summary of the Grounds for Rehearing and Rehearing En Banc	1
II. Facts	4
A. Harrah’s Appearance Policy Facially Differentiates Based On Sex	5
B. Jespersen Testified About the Significant Burden On Her As A Female Employee; Her Testimony Was Admissible, Relevant, Direct Evidence	5
III. The Panel Majority Has Created Conflict With Controlling Authority	7
A. The Majority’s Decision Misapplies Existing Law And Creates Conflicts With Supreme Court and Prior Ninth Circuit Decisions Forbidding Discrimination On the Basis of Gender Stereotypes	7
B. The “Equal Burdens” Test Is Inconsistent With More Recent Decisions Concerning Sex Stereotyping, and Fails To Address The Harms Caused By Appearance Rules That Discriminate “Equally” Though Differently Against Both Male and Female Employees “Because Of Sex.” ...	13

IV.	The Majority Has Created Questions of Exceptional Importance By Curtailing and Causing Confusion Regarding Title VII's Protections Against Sex Discrimination	16
V.	Conclusion	17
	Certificate of Compliance	18
	Exhibit 1 (Panel Majority Opinion and Dissenting Opinion)	
	Exhibit 2 (Harrah's Appearance and Grooming Policy)	
	Exhibit 3 (Excerpts of the Deposition Testimony of Darlene Jespersen)	
	Proof of Service	

TABLE OF AUTHORITIES

	<u>Page</u>
CASES	
<i>Carroll v. Talman Federal Savings and Loan Ass'n</i> , 604 F.2d 1028 (7th Cir. 1979)	7, 10, 12, 14
<i>City of Los Angeles, Dep't of Water & Power v. Manhart</i> , 435 U.S. 702 (1978)	13
<i>County of Washington v. Gunther</i> , 452 U.S. 161 (1981)	1
<i>Frank v. United Airlines</i> , 216 F.3d 845 (9th Cir. 2000), cert. denied, 532 U.S. 914 (2001)	passim
<i>Gerdorn v. Continental Airlines</i> , 692 F.2d 602 (9th Cir. 1982)	passim
<i>Hamm v. Weyauwega Milk Prods., Inc.</i> , 332 F.3d 1058 (7th Cir. 2003)	16
<i>International Union, UAW v. Johnson Controls</i> , 499 U.S. 187 (1991)	13
<i>Jespersen v. Harrah's Operating Company, Inc.</i> , 280 F. Supp. 2d 1189 (D. Nev. 2002)	2
<i>Mississippi University for Women v. Hogan</i> , 458 U.S. 718 (1982)	9, 10
<i>Nevada Department of Human Resources v. Hibbs</i> , 538 U.S. 721 (2003)	15

<i>Nichols v. Azteca Restaurants Enterprises, Inc.</i> , 256 F.3d 864 (9th Cir. 2001)	11, 15, 16
<i>Pavon v. Swift Transp. Co.</i> , 192 F.3d 902 (9th Cir.1999)	14, 15
<i>Price Waterhouse v. Hopkins</i> , 490 U.S. 228 (1989)	<i>passim</i>
<i>Rene v. MGM Grand Hotel, Inc.</i> , 305 F.3d 1061 (9 th Cir. 2002), <i>cert. denied</i> , 538 U.S. 922 (2003)	10, 11, 16
<i>Schwenk v. Hartford</i> , 204 F.3d 1187 (9th Cir. 2000)	16
<i>Smith v. Salem</i> , 378 F.3d 566 (6 th Cir. 2004)	11, 16
<i>Steiner v. Showboat Operating Company</i> , 25 F.3d 1459 (9th Cir. 1994)	14

STATUTES

42 U.S.C. § 2000e-2(a)(1)	13
---------------------------------	----

SECONDARY AUTHORITIES

Taub, Nadine, <i>Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination</i> , 21 B.C. L. Rev. 345 (1980)	10
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“In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”

– *Gedrom v. Continental Airlines, Inc.*, 692 F.2d 602, 607 (9th Cir. 1982) (en banc) (quoting *County of Washington v. Gunther*, 452 U.S. 161 (1981)), *cert. dismissed*, 460 U.S. 1074 (1983).

I. INTRODUCTION AND SUMMARY OF THE GROUNDS FOR REHEARING AND REHEARING EN BANC.

Plaintiff-Appellant Darlene Jespersen (“Jespersen”) petitions for rehearing and rehearing en banc of the panel majority’s decision affirming the order granting summary judgment against her on her Title VII claim against Harrah’s Operating Company, Inc. (“Harrah’s”) for firing her after nearly twenty years of exemplary service as a casino bartender.¹ Despite her outstanding performance reviews and glowing comments from her customers at the Sports Bar, Harrah’s ended Jespersen’s employment because she did not comply when management imposed a new requirement that all female beverage servers wear elaborate facial makeup at all times while working, as instructed by company make-over consultants. By contrast, male bartenders simply were instructed not to wear makeup.²

Jespersen had tried to comply with Harrah’s make-over rules, but had found

¹ The panel majority’s Opinion and the Dissent are attached hereto as Exhibit 1.

² A copy of Harrah’s employee appearance policy, as included in Appellant’s Excerpts of Record (“ER”), is attached hereto as Exhibit 2.

the results so demeaning that they prevented her from performing her job effectively.³ Harrah's disputed neither the sex-differentiation explicit in the policy, nor the adverse impact the policy had on Jespersen. Nonetheless, it contends it may require its female employees to adhere to a multi-step, daily make-over because its customers appreciate that appearance.

Applying a legal test that dates from the 1970's, the district court judge granted Harrah's motion for summary judgment, holding that the sex-specific rules do not constitute discrimination "because of sex" because, as a matter of law, they impose equal – though different – burdens on female and male employees.

Jespersen v. Harrah's Operating Company, 280 F. Supp. 2d 1189 (D. Nev. 2002).

On Jespersen's appeal, the panel was to review the decision *de novo* to determine whether the district court had applied the law correctly and, viewing the evidence in the light most favorable to Jespersen, whether genuine issues of material fact precluded entry of summary judgment against her. *Frank v. United Airlines*, 216 F.3d 845, 849 (9th Cir. 2000), *cert. denied*, 532 U.S. 914 (2001). As the dissent explains, the panel majority erred as to both aspects of its review.

First, the majority mistakenly concluded that it was bound by a recent, *en banc* decision of this Court to reject one of Jespersen's main legal arguments,

³ Excerpts from Jespersen's deposition testimony concerning the effect on her of the makeup requirement, as included in her Excerpts of Record, are attached hereto as Exhibit 3.

namely, that the Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), requires this Court to adjust its decades-old "equal burdens" test by incorporating the more recently enunciated principle that employers may not treat employees adversely based on stereotyped notions of proper gender presentation and deportment. See Opinion at *20. In fact, the Circuit's *en banc* decision adopting the so-called "equal burdens" test for sex-differentiated appearance codes predated *Price Waterhouse* by seven years. *Gerdorn v. Continental*, 692 F.2d at 602. The post-*Price Waterhouse* decision to which the majority inaccurately refers, *Frank v. United Airlines*, actually was merely a panel decision applying *Gerdorn*. Moreover, *Frank* hardly can be read as rejecting *Price Waterhouse*'s critique of sex stereotyping, because the *Frank* panel explicitly stated that it was *not* considering whether imposing different appearance standards on women and men is a *per se* violation of Title VII, since the sex-specific rule at issue in *Frank* failed even the "equal burdens" test. 216 F.3d at 855.

Second, by "declining" to apply *Price Waterhouse* in this context (Opinion at *19), the majority has created inconsistencies with *Price Waterhouse* and other Supreme Court decisions as well as prior decisions of this Court. For example, the majority appears to have created an exception to the general rule established in *Price Waterhouse*, that working women are to be judged based on their job performance, rather than their gender conformity.

Third, contrary to prior Ninth Circuit cases, the majority erroneously discounted the probative value of Jespersen's testimony as evidence of the policy's weighty burden on women, and illogically faulted her for lacking evidence to prove a negative, that is, the non-existence of comparable burdens on men. *See* Dissent at *29-30. In doing so, the majority improperly took from the finder of fact the central, disputed factual question in this case, that is, whether Harrah's appearance policy (either taken as a whole or considering just the makeup requirements imposed only on women) imposes greater burdens on female bartenders than on male ones.

Each of these categories of error created conflict with settled law and confusion for future cases. Accordingly, further review is necessary.

II. FACTS

There is no dispute that Jespersen was an exemplary employee.⁴ She received repeated commendations from her supervisors and unsolicited praise from her customers. ER at 124-99. Her outstanding performance for roughly twenty years proves that elaborate facial makeup is not necessary for a woman to be a top-notch bartender in a casino sports bar.

⁴ Given the consistency between the factual descriptions in the panel Opinion and the Dissent, only a brief summary is set out here. Jespersen's opening and reply briefs to the panel contain more detailed presentations. For convenience, true copies of those briefs are available at <<http://www.lamdalegal.org/cgi-bin/iowa/documents/record?record=1614>>. Copies of the *amicus curiae* briefs by the ACLU of Nevada, et al., and the National Employment Lawyers Association, et al., in support of Jespersen are available there for convenient reference as well.

A. Harrah's Appearance Policy Facially Differentiates Based On Sex.

By its terms, Harrah's policy treats male and female employees differently "because of sex." *See* Exh. 2. Under its prior appearance policy, Harrah's had encouraged its female employees to wear facial makeup. Exh. 3, ER at 121. The new policy changed that request into a non-negotiable demand, and established a specific regimen of face powder, blush, and mascara, with lip color to be worn "at all times." *See* Exh. 2, ER at 79. According to the new rules, a company "image consultant" decides the details of each female employee's "look," which is captured by photograph after the employee's "make-over." Each day, the female employee must duplicate that look exactly, without deviation. *Id.* at 80. In addition to the loss of freedom and dignity to determine and periodically vary one's professional appearance, each day Harrah's female employees also lose the money and time needed to comply. By contrast, Harrah's male employees incur no analogous financial and temporal costs, and they retain free choice about whether to appear clean-shaven or with facial hair of any style, as long as they stay clean and tidy.

B. Jespersen Testified About The Significant Burden On Her As A Female Employee; Her Testimony Was Admissible, Relevant, Direct Evidence.

Years before Harrah's imposed these appearance rules, Jespersen had tried

in good faith to wear makeup in response to a supervisor's request. To her distress, she found it made her terribly uncomfortable and alienated. She testified that she had felt "degraded" that she had to "cover [her] face and become pretty or feminine" as a requirement of her bartending job. Exh. 3, ER at 121.

Jespersen made a serious effort to comply, however, and wore the makeup for a number of weeks. During that time, she realized that the makeup impeded her ability to work. It seemed to invite her customers to perceive and interact with her differently. It also made her feel self-conscious and humiliated. In her words:

[The makeup] prohibited me from doing my job. I felt exposed. I actually felt like I was naked. . . . forced to be feminine to do that job, to stay employed, when it had nothing to do with the making of a drink.

Exh. 3, ER at 121.

Thus, when the casino changed its policy from merely requesting that its female beverage servers wear makeup to requiring it, Jespersen knew she would not be able comply on a permanent basis. She declined to agree to employment terms with which she could not comply, and Harrah's fired her.⁵

⁵ As Jespersen testified, Harrah's presented her with a list of open positions with the company and urged her to apply for another job. But the company did not arrange for her to transfer laterally to a comparable job for a comparable wage. Instead, despite her twenty-year tenure, she was in the same pool with new applicants. Further, she was not qualified for a great many of the positions, and many were entry-level jobs for minimal pay. Exh. 3, ER at 115-17.

III. THE PANEL MAJORITY HAS CREATED CONFLICT WITH CONTROLLING AUTHORITY.

A. The Majority's Decision Misapplies Existing Law and Creates Conflicts With Supreme Court and Prior Ninth Circuit Decisions Forbidding Discrimination on the Basis of Gender Stereotypes.

Since 1989, the Supreme Court's *Price Waterhouse v. Hopkins* decision has protected working women from being judged based on their degree of conformity with gender stereotypes rather than their job performance. Within the Ninth Circuit, prior case law consistently has condemned employers that have claimed their businesses will wither unless they can require their female employees to present an "appealing" feminine look that their customers allegedly prefer. On challenges to those feminine appearance rules, this Court – like other federal circuits – has found the policies to be facially discriminatory, employing gender stereotypes that send a harmful, subordinating message, and that hinder women's ability to succeed professionally. *See Frank*, 216 F.3d at 845; *Gerdorn*, 692 F.2d at 607 (discussing cases); *see also Carroll v. Talman Fed. Sav. & Loan Ass'n*, 604 F.2d 1028 (7th Cir. 1979) (holding that, although there may be nothing discriminatory about uniforms *per se*, if only women must wear them, while men are deemed to have sufficient judgment to choose their own professional attire, the rule sends an impermissible message of gender subordination).

Because the airlines in *Gerdorn* and *Frank* could not show that their sex-based rules were reasonably necessary to their businesses – as Title VII requires –

the discriminatory policies had to give way. *Frank*, 216 F.3d at 855; *Gerdorn*, 692 F.2d at 609. The airlines now employ both women and men as flight attendants, without sex-specific, oppressive appearance rules. By contrast here, despite the settled law placing on *employers* the burden to justify policies that burden differentially by sex, the majority panel erroneously relieved Harrah's of any burden to show why its female bartenders must "uniform" their faces as well as their bodies, while their male counterparts – with the exact same job description – need only uniform their bodies.

Mistakenly construing the *Frank* decision as barring consideration of sex-stereotypes in appearance code cases, and also mistaking *Frank* as an *en banc* ruling, the majority panel concluded it lacked authority to harmonize the Circuit's earlier *en banc* analysis of *Gerdorn* with the later *Price Waterhouse* decision. The majority thus improperly rejected Jespersen's claim that Harrah's woman-only makeup rule is suspect specifically because it imposes harmful, gender-based stereotypes, irrespective of whether those stereotypes can be weighed and found to be "equally" oppressive to women and men.

But *Frank* is not the barrier for which it was taken. Not an *en banc* decision at all, *Frank* simply applies *Gerdorn*'s early 1980's analysis to another airline's similar treatment of female flight attendants, without considering how the test enunciated in *Gerdorn* might apply to a policy like Harrah's that imposes

conformity with multiple stereotypes for male and female employees.

And nothing in *Gerdorn* bars the analysis Jespersen advances. In fact, in holding that Continental's differential weight rule violated Title VII, the *Gerdorn* court stressed that stereotypical notions of feminine attractiveness had motivated the restrictive rule in the first place. The court faulted the airlines for "restricting job opportunities and *imposing special conditions on the basis of gender stereotypes*," 692 F.2d at 606 (emphasis added), and invoked the Supreme Court's condemnation of "[t]he harmful effects of occupational cliches." 692 F.2d at 607 (citing *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982)).⁶

Thus, *Frank* and *Gerdorn* do not preclude application of *Price Waterhouse* in a case like this. Indeed, as the dissent explained, this is a classic *Price Waterhouse* case. See Dissent at *24. Like Ann Hopkins, Darlene Jespersen successfully made her way in a traditionally male-dominated occupation. Like Hopkins, she was a strong performer when measured by gender-neutral standards.⁷ Yet, although the job duties for Harrah's male and female bartenders were exactly

⁶ *Gerdorn* noted the discussion in *Hogan* of the historical exclusion of women from certain professions, including law and bartending. How ironic and troubling that the majority's decision here, two decades later, accepts that women may be bartenders, but finds no discrimination in a rule that allows them that occupation only if they conform to a stereotype more commonly imposed on cocktail waitresses. *Id.*

⁷ Indeed, where Hopkins' performance reviews were a mix of legitimate and discriminatory critique, Jespersen's were unequivocal in their praise. ER at 124-99.

the same,⁸ Jespersen – like Hopkins – was deemed unacceptable because she was seen as insufficiently feminine.

As in *Price Waterhouse*, the femininity requirement created a “Catch-22” for Jespersen, whose less-feminine attributes appear to have contributed to her success, especially when it came to managing unruly bar patrons. Opinion at *3; *see* 490 U.S. at 251. Thus whether a woman is a business executive or a bartender, requiring her to look and/or act stereotypically feminine may make it considerably more difficult for her to succeed.

Thus, *Price Waterhouse* is not limited just to particular occupations, but applies with equal force in circumstances like those addressed by *Carroll*, *Frank*, and *Gerdorf*, involving historically female occupations in which women-only appearance rules serve improperly to reinforce the “feminine” nature of that domain. *See* Nadine Taub, *Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination*, 21 B.C. L. Rev. 345, 387 (1980), *cited in Frank*, 216 F.3d at 855; *see also Hogan*, 458 U.S. at 718.⁹

⁸ A copy of the bartenders’ job duties is in Exhibit 2, at 83. Although Harrah’s proffered business necessity defense is not in issue on this appeal, it is notable that Harrah’s has argued that its female bartenders need makeup because their duties include an element of performance and they must be visible under the casino lighting, despite the fact that Jespersen’s job description contains nothing about performing any kind of role. And Harrah’s inapposite various references in its briefing to Disneyland – where male and female staff appear as costumed characters – do not explain what about the casino’s lighting or sports bar services requires that the women bartenders – and only the women – “costume” their faces.

⁹ *Price Waterhouse* of course protects men similarly, as multiple decisions of this Court have held. *See, e.g., Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1068 (9th Cir. 2002)

Thus, as the dissent explains, *Frank* and *Gerdom* easily can be harmonized with the Supreme Court's precedents regarding gender stereotyping. *See* Dissent at *26; *see also Smith v. Salem*, 378 F.3d 566, 574 (6th Cir. 2004) ("After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex.").

The majority seems improperly to attempt to limit *Price Waterhouse*'s sex stereotyping rule to harassment cases. But as the dissent points out, *Price Waterhouse* itself was not a harassment case; rather, like the present action, it was an adverse job action case. *See* Dissent at * 24.¹⁰ In addition, as the dissent observes, there is no logic – nor any textual support – for a rule that Title VII protects employees perceived to be gender-nonconforming against harassment, but not against termination for the same reason. *See* Dissent at *25.

Likewise, the *Price Waterhouse* court hardly would have come to a different conclusion and left Anne Hopkins unprotected had the accounting firm codified

(Pregerson, , J., conc.), *cert. denied*, 538 U.S. 922 (2003); *Nichols v. Azteca Restaurants Enterprises, Inc.*, 256 F.3d 864 (9th Cir. 2001).

¹⁰ In addition to that error, the panel also seemed to see itself constrained by the dictum in a footnote in *Nichols*, 256 F.3d at 875 n.7. *See* Opinion at *19. But the *Nichols* court gave no analysis to explain why Title VII would forbid co-worker harassment based on an employee's gender variance, but not termination or other adverse action by the employer.

into an official policy its requirement that its female account executives wear makeup, jewelry and “soft-hued suits.” 490 U.S. at 256.

The majority panel further misconstrued existing law in holding that Harrah’s makeup rule cannot be considered on its own, but must be weighed together with Harrah’s other personal appearance rules. None of the relevant precedents conducted an “apples and oranges” comparison like the one the majority purports to undertake in this case. *Frank*, *Gerdorn*, and *Carroll*, for example, all simply assessed the relative burdens on women and men of the single restriction being challenged by the female plaintiffs.

Moreover, even assessing Harrah’s policy as a whole, it is obvious – as the dissent notes – given the plain sex-differentiated language about hair styles and fingernail grooming – that a reasonable jury easily could find the daily hair styling and elaborate facial makeup requirements for women more burdensome than the far more limited requirements for men. Considering the policy’s differing terms, together with the common knowledge of personal grooming that a jury would be charged to apply, it was manifest error for the panel majority to make a factual determination as to the relative burdens of these requirements, and then hold as a matter of law that no reasonable jury could find the demands on women to be more onerous. *See* Dissent at *31-32.

In sum, the panel majority has misapplied numerous applicable precedents. In so doing, it has created inconsistencies that promise confusion for future cases. Perhaps most worrisome, it appears to have created a two-tier standard that deprives women in service industries of the protections previously available to all workers under *Price Waterhouse*. These errors warrant reconsideration.

B. The “Equal Burdens” Test Is Inconsistent With More Recent Decisions Concerning Sex Stereotyping, and Fails To Address The Harms Caused By Appearance Rules That Discriminate “Equally” Though Differently Against Both Male and Female Employees “Because Of Sex.”

By its terms, Title VII protects “individuals.” 42 U.S.C. § 2000e-2(a)(1). As the Supreme Court has explained, “[T]he statute requires that we focus on fairness to individuals rather than fairness to classes,” because “[p]ractices that classify employees in terms of religion, race, or sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals.” *City of Los Angeles, Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 709 (1978). The panel majority is correct to highlight that “on a Title VII disparate treatment sex discrimination claim, an employee need only establish that, but for his or her sex, he or she would have been treated differently.” Opinion at *8-9 (citing *International Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 198-200 (1991) and *Manhart*, 435 U.S. at 711). That rule *should* dictate a favorable result

for Jespersen here because, had she been treated the same as her male coworkers, she still would be making her living tending Harrah's Sports Bar.

But since the 1970's, the courts have not applied this simple principle to sex-differentiated appearance codes. Instead, as the dissent observes, they crafted the "equal burdens" exception to the statutory language for sex-specific appearance codes that were designed to restrain the youth subculture, not to subordinate men based on gender. As the majority panel acknowledged, the "equal burdens" cases do not "define [its] exact parameters," and it remains "undefined" today. Opinion at *14, fn.4. Yet it has become increasingly anachronistic with time.

Cases like *Carroll*, *Gerdorn* and *Frank* show that this test has been useful – if at all – only to assess policies that treat male and female employees differently as to one requirement (such as weight or a uniform). But, as the dissent points out, the test becomes unworkable when a policy – like Harrah's here – contains multiple, different requirements because it offers no method for "balancing" unrelated burdens. Faced with such a policy, the test becomes incoherent.

In other contexts, courts wisely have rejected the "different but equal" idea. Thus, employers may not defend sexual harassment of women by subjecting men to like treatment. See *Steiner v. Showboat Operating Company*, 25 F.3d 1459, 1463-64 (9th Cir. 1994). The same is true in the context of race. *Pavon v. Swift*

Transp. Co., 192 F.3d 902, 908 (9th Cir.1999). In both circumstances, where harassment of an individual gained its potency due to the sex or race of the victim, it was prohibited – regardless of additional violations that may have been inflicted upon others.¹¹ Consequently, if a male employee is subjected to pervasive harassment because he is seen as too effeminate, as in *Nichols*, that violation will not be cured if his coworkers subject a “mannish” female coworker to different, but equally abusive, treatment. Cf. *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 736 (2003) (Rehnquist, J.) (condemning “parallel stereotypes” of women and men that are “mutually reinforcing” and create “a self-fulfilling cycle of discrimination”).

It is true that the Ninth Circuit adopted the analytically unsound “equal burdens” test *en banc* in *Gerdorn*, but in that case it had no need to consider the full implications of that test because Continental’s policy failed it. 692 F.2d at 605-06. *Frank* then followed *Gerdorn*, also without needing to reconsider the test – such as to reconcile it with *Price Waterhouse* – because United’s policy likewise failed it. 216 F.3d at 854-55.

¹¹ To apply this reasoning by analogy to Harrah’s policy, consider a race-based “make-over” that requires Asian American women to wear eye make up to exaggerate the shape of their eyes, African-American women to wear their hair in corn-rows, and Iranian-American women to cover their hair completely “at all times,” while prohibiting Caucasian women from doing any of these things. The statutory violation is unmistakable.

This Court's recent decisions applying *Price Waterhouse* to protect individuals from abuse based on gender stereotypes reveal the paucity of the remaining doctrinal support for the older Ninth Circuit opinions. *See Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000); *Nichols*, 256 F.3d at 864; *Rene*, 305 F.3d at 1061. Yet, while the result in *Rene v. MGM Grand* makes plain the lack of foundation under the old cases, its fractured opinions leave important questions unanswered. *See* 305 F.3d at 1061, 1068, 1069, 1070, 1071. Though some other circuits understand this circuit's law to offer sound protection against adverse treatment because of non-adherence to sex stereotypes, *e.g. Smith v. Salem*, 378 F.3d at 566, others disagree. *See, e.g., Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1066 (7th Cir. 2003) (Posner, J., conc.). In sum, the present inconsistency within Ninth Circuit law impairs the protections to which individuals are entitled under one of the nation's most important civil rights statutes. The Court should address this problem by granting rehearing in this case.

IV. THE MAJORITY HAS CREATED QUESTIONS OF EXCEPTIONAL IMPORTANCE BY CURTAILING AND CAUSING CONFUSION REGARDING TITLE VII'S PROTECTIONS AGAINST SEX DISCRIMINATION.

Rehearing of this matter is necessary to resolve the inconsistencies between applicable sex discrimination decisions of the Supreme Court, past decisions of this Circuit concerning employer-imposed, sex-differentiated appearance codes for

workers, and the panel majority's decision in this case. These inconsistencies present questions of exceptional importance that warrant consideration immediately because they are likely to generate confusion in the lower courts, and an increase in oppressive, sex-based workplace rules. In particular, the Court's apparent retreat from the pragmatic approach used in the airline cases over the years invites an increase in sex discrimination. These seeming changes in the law, if not reevaluated, promise frustration for employees and employers alike, as well as unwarranted barriers to enforcement of the protections guaranteed by Title VII.

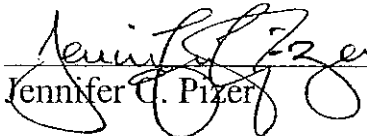
V. CONCLUSION

For the foregoing reasons, plaintiff-appellant Darlene Jespersen petitions for panel rehearing and rehearing en banc.

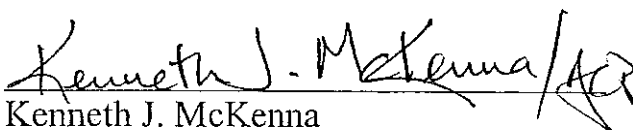
DATE: January 17, 2005

Respectfully submitted,

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DARLENE JESPERSEN

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TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
I. INTRODUCTION	1
II. FACTS	3
A. Harrah's Appearance Policy.....	3
B. There Is No Evidence In The Record Of Any Tangible Unequal Burdens Placed On Employees By The Gender-Specific Appearance Standard.....	5
III. THE DECISION IS CONSISTENT WITH CONTROLLING AUTHORITY	6
A. The Decision Correctly Applies Existing Law And Is Consistent With Supreme Court And Ninth Circuit Authority	6
1. The Unequal Burdens Test.....	7
2. Under The Facts Presented, Harrah's Was Not Required To Justify Its Policy As A BFOQ	8
3. The Majority Was Correct In Not Applying A Gender Stereotyping Analysis To An Appearance Standards Case	9
B. The Unequal Burdens Test Is Appropriate.....	12
IV. THERE IS NO QUESTION OF EXCEPTIONAL IMPORTANCE	15
V. CONCLUSION.....	17
CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT RULES 35-1 AND 40-1.....	18
PROOF OF SERVICE	19

TABLE OF AUTHORITIES

CASES	PAGE
<i>Ballard v. United States</i> , 329 U.S. 187 (1946).....	1
<i>Barrett v. American Medical Response</i> , 230 F.Supp. 2d 1160	15
<i>Carroll v. Talman Federal Sav. & Loan Asso.</i> , 604 F.2d 1028 (7 th Cir., 1979) <i>cert. denied</i> 445 U.S. 929 (1980).....	7
<i>Frank v. United Airlines, Inc.</i> , 216 F.3d 845 (9 th Cir. 2000)	1, 2, 6, 7, 8, 9, 10, 11, 12
<i>Gerdorn v. Continental Airlines, Inc.</i> , 692 F.3d 602 (9 th Cir. 1982)	1, 6, 7, 8
<i>Hamm v. Weyauwega Milk Prods., Inc.</i> 332 F.3d 1058 (7 th Cir. 2003)	13, 14
<i>Hart v. Massanari</i> , 266 F.3d 1155 (9 th Cir. 2001)	10
<i>Jespersen v. Harrah's Operating Company, Inc.</i> , 392 F.3d 1076 (9 th Cir. 2004)	6, 8, 9, 10
<i>Nichols v. Azteca Rest. Enter.</i> , 256 F.3d 864 (9 th Cir. 2001)	3, 11, 12
<i>Oncale v. Sundowner Offshore Servs.</i> , 523 U.S. 75 (1998).....	3, 8
<i>Price Waterhouse v. Hopkins</i> , 490 U.S. 223 (1989).....	2, 6, 8, 9, 10, 11, 12, 13, 14, 15
<i>Willingham v. Macon Tel. Pub. Co.</i> , 507 F.2d 1084 (5 th Cir. 1975)	9

“The truth is that the two sexes are not fungible . . .”

Ballard v. United States, 329 U.S. 187 (1946)

I. INTRODUCTION

Plaintiff-Appellant Darlene Jespersen (“Jespersen”) petitions for rehearing and rehearing *en banc* of the majority’s decision affirming the order granting summary judgment against her on her Title VII claim against Harrah’s Operating Company, Inc. (“Harrah’s”). Harrah’s opposes the petition because the majority has not erred, *en banc* consideration is not necessary to secure or maintain uniformity of the Court’s decisions, and the proceeding does not involve a question of exceptional importance.

The majority held, consistent with precedent, that Harrah’s gender-specific appearance standard must be evaluated pursuant to the unequal burdens test. *See Frank v. United Airlines, Inc.*, 216 F.3d 845 (9th Cir. 2000); *Gerdomb v. Continental Airlines, Inc.*, 692 F.3d 602 (9th Cir. 1982). The majority, however, was constrained to apply the test to the instant facts because Jespersen failed to present any evidence of the burdens imposed by the policy on employees of either sex. Notably, there was no evidence of the cost or time imposed on employees of either sex to comply with the policy. Jespersen’s subjective, self-serving testimony about the intangible burdens placed upon her by the policy were insufficient to create material issues of fact. Accordingly, Jespersen failed to meet her burden of

production to demonstrate that Harrah's appearance standard imposes a greater burden on female employees than it does on male employees, and the dismissal of her case was affirmed.

Initially, Jespersen argues the unequal burdens test is the correct law, but misapplied and misconstrued by the majority. That argument, however, is a superficial attempt to distract this Court from Jespersen's failure to meet her burden of production. For example, Jespersen attempts to confuse the analysis by claiming that Harrah's has the initial burden to justify its gender-specific appearance standard. This is a clear misstatement of the law, and an inappropriate attempt to shift the burden.

Next, Jespersen argues that *Frank*, a case relied upon by the majority, is irrelevant because it is a panel and not an *en banc* decision. This is yet another attempt to mislead and confuse, as a panel decision carries as much weight as an *en banc* decision unless it is overturned by a subsequent *en banc* or Supreme Court decision. There is no intervening case, and, thus, *Frank* is good law.

Next, Jespersen argues that this Court has not construed appearance standards in light of *Price Waterhouse v. Hopkins*, 490 U.S. 223 (1989) (plurality opinion) (superceded in part by statute), because *Frank* purportedly has no precedential value. As set forth above, *Frank* is binding authority and must be followed. *Frank* was decided eleven years after *Price Waterhouse*, and adopted

the unequal burdens test. In addition, subsequent decisions of this Court have reiterated the unequal burdens test. *See, e.g., Nichols v. Azteca Rest. Enter.*, 256 F.3d 864 (9th Cir. 2001). The majority was, therefore, required to apply the unequal burdens test to the instant facts.

Finally, Jespersen argues that the unequal burdens test is “anachronistic,” “incoherent,” and “analytically unsound.” She, therefore, advocates a radical change in the law that would prohibit all gender distinctions in employment. However, Title VII does not mandate an androgynous or asexual workplace, and it should not be mandated here. *See Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 81 (1998).

II. FACTS

The facts in general are not in dispute. However, they deserve clarification as set forth below.

A. Harrah’s Appearance Policy

In 2000, Harrah’s implemented changes in its Beverage Department to raise the total service performance of the beverage team. There were four key parts to the initiative: uniforms, appearance and grooming standards, performance standards and expectations, and selection and hiring processes. The appearance and grooming standards include gender-neutral and gender-specific appearance standards:

Overall Guidelines (applied equally to male/female):

- Appearance: Must maintain Personal Best image portrayed at time of hire.
- Jewelry, if issued, must be worn. Otherwise, tasteful and simple jewelry is permitted; no large chokers, chains or bracelets.
- No faddish hairstyles or unnatural colors are permitted.

Males:

- Hair must not extend below top of shirt collar. Ponytails are prohibited.
- Hands and fingernails must be clean and nails neatly trimmed at all times. No colored polish is permitted.
- Eye and facial makeup is not permitted.
- Shoes will be solid black leather or leather type with rubber (non skid) soles.

Females:

- Hair must be teased, curled or styled every day you work. Hair may be worn down or up. When worn up, hair must be secured completely off the neck and face (bangs may not fall below the eyebrows) with no hair wisps or tendrils. Ends must be finished, curled and/or pinned under. No visible hair restraints or ornaments are permitted. Ponytails, multiple ponytails, regular braids, buns, and hair worn half-up/half-down are not permitted.
- Stockings are to be sheer Jet Black in color. No runs.
- Nail polish can be clear, white, pink, red, wine or burgundy color only. No exotic nail art or length.
- Shoes will be solid black leather or leather type with rubber (non skid) soles.
- Make up (foundation/concealer and/or face powder, as well as blush and mascara) must be worn and applied neatly in complimentary colors. Lip color must be worn at all times.

ER at 35 (Kite Decl., ¶ 8); ER at 79-80 (Brand Standard Appearance and Grooming).

Jespersen, a former bartender at Harrah's, objected to the requirement that women wear makeup. Because Jespersen refused to comply with a company policy, she was terminated.

B. There is No Evidence in the Record of any Tangible Unequal Burdens Placed on Employees by the Gender-Specific Appearance Standard

Jespersen objects to Harrah's gender-specific appearance standard based on the makeup requirement. **ER at 48-49 (Jespersen Depo., pp. 70:22-71:6).** Jespersen claims, without a shred of evidence, that Harrah's appearance standards are more costly, and time-consuming for women than for men.

For example, Jespersen argued that makeup is "not inexpensive," and can cost hundreds of dollars per year. **Appellant's Corrected Opening Brief, p. 28.** There are no statistics regarding makeup, or evidence of what makeup would have cost Jespersen if she had chosen to comply, which she did not. Accordingly, there is no admissible evidence in the record that the cost or time spent in complying with Harrah's appearance standards imposes an unequal burden on women that is not similarly imposed upon men.

In addition, there is no evidence in the record of the burdens imposed by the policy on male bartenders. Notably, there is no evidence of what is required of a male – both financially and temporally – to adhere to the clean-face policy, including shaving and maintaining short hair. As the majority pointed out, the lack

of evidence in the record prevents a meaningful analysis of the burdens imposed on each gender by Harrah's appearance policy. *See Jespersen v. Harrah's Operating Company, Inc.*, 392 F.3d 1076, 1081 (9th Cir. 2004). Accordingly, Jespersen failed to meet her burden of production to demonstrate genuine issues of material fact.

III. THE DECISION IS CONSISTENT WITH CONTROLLING AUTHORITY

Pursuant to FRAP 35, Jespersen argues that her petition should be granted because the decision is inconsistent with a decision of the United States Supreme Court and previous decisions of this Court. As set forth below, the decision is consistent with controlling authority, and, therefore, neither a rehearing or rehearing *en banc* are necessary.

A. The Decision Correctly Applies Existing Law and is Consistent with Supreme Court and Ninth Circuit Authority

Jespersen argues that the primary authority at issue here is *Price Waterhouse v. Hopkins*, 490 U.S. 223 (1989) (plurality opinion) (superceded in part by statute). She asserts that *Price Waterhouse* creates a claim under Title VII for gender stereotyping, which precludes all sex-based distinctions in employment. Jespersen also claims that the following Ninth Circuit authority is essentially consistent with *Price Waterhouse's* purported broad mandate to eradicate all sex-based distinction in employment: *Gerdon v. Continental Airlines, Inc.*, 692 F.3d 602 (9th Cir. 1982), and *Frank v. United Airlines, Inc.*, 216 F.3d 845 (9th Cir. 2000). Notably,

Gerdom and *Frank* are the primary authority relied upon by the majority in reaching their decision. Jespersen, however, argues that the majority misconstrued and misapplied *Gerdom* and *Frank*.

1. **The unequal burdens test**

In *Gerdom*, this Court held that gender-specific appearance standards which do not impose unequal burdens on either sex are permissible and do not violate Title VII. *See Gerdom*, 692 F.3d at 605-06. In that case, however, Continental Airlines required its flight hostesses to comply with strict weight requirements as a condition of their employment, *with no counterpart applicable to men*. This one-sided policy was found to be discriminatory on its face, and, thus, violative of Title VII. *See id.* at 608; *see also Carroll v. Talman Federal Sav. & Loan Asso.*, 604 F.2d 1028, 1032 (7th Cir., 1979) *cert. denied* 445 U.S. 929 (1980) (an employer's requirement that only female employees wear uniforms is disparate treatment).

In *Frank*, this Court again evaluated gender-specific appearance standards and held that “An appearance standard that imposes different but essentially equal burdens on men and women is not disparate treatment.” *Frank*, 216 F.3d at 854. In that case, this Court struck down a United Airline's weight requirement that imposed unequal burdens on women. *See id.* Specifically, the policy required men to not weigh more than a weight limit for large-framed men whether they were large-framed or not, while women could not weigh more than medium-framed

women. As women were required to meet a stricter standard, the policy was found to impose an unequal burden on women, and, thus, resulted in disparate treatment. *See id.*

Based on *Gerdorn*, *Frank*, and their progeny, the majority attempted to evaluate the relative burdens of Harrah's appearance policy, which necessarily included the actual impact on both male and female employees. *See Jespersen*, 392 F.3d at 1081. However, there was no evidence in the record of the cost and time necessary for employees of each sex to comply with the policy. *See id.* Jespersen's claim, therefore, failed.

Furthermore, it is self-evident that in the context of gender-specific appearance standards the courts must be given latitude to weigh the *relative* burdens it imposed on each sex. A finding to the contrary would illegally mandate an asexual or androgynous workplace. *See Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 81 (1998); *see also Price Waterhouse*, 490 U.S. at 277 ("Race and gender always 'play a role' in an employment decision in the benign sense that there are human characteristics of which decisionmakers are aware and about which they may comment in a perfectly neutral and nondiscriminatory fashion.").

2. Under the facts presented, Harrah's was not required to justify its policy as a BFOQ

Jespersen argues that the majority erroneously failed to require Harrah's to justify its gender-specific policy. In other words, Jespersen claims that *Gerdorn*

and *Frank* require an employer to justify all gender-specific policies. Jespersen, however, is “putting the cart before the horse.” As the majority recognized, “[a] sex-differentiated appearance standard that imposes unequal burdens on men and women is disparate treatment that must be justified as a BFOQ.” *Jespersen*, 392 F.3d at 1080 (citation omitted). In other words, an unequal burdens assessment is a predicate to the requirement that an employer demonstrate its gender-specific policy is justified as a *bona fide* occupational qualification (“BFOQ”).¹

For example, in *Frank*, the appearance standards were found to be unequal burdens on women over men, and thus, the employers were required to demonstrate that their policies were justified as BFOQs. *See Frank*, 216 F.3d at 855. Here, however, Jespersen did not meet her burden of production to demonstrate that Harrah’s policy imposed an unequal burden on women over men, and, thus, Harrah’s was not required to justify its policy as a BFOQ. Accordingly, it is Jespersen who has misconstrued the law and not the majority.

3. The majority was correct in not applying a gender stereotyping analysis to an appearance standards case

Jespersen next argues the majority misconstrued the law by concluding that it lacked authority to apply *Price Waterhouse* to an appearance standards case.

¹ *See, e.g., Willingham v. Macon Tel. Pub. Co.*, 507 F.2d 1084, 1088 (5th Cir. 1975) (In the seminal case discussing gender-specific appearance requirements, the court evaluated a claim involving different hair length standards for men and women by applying it to a three-step analysis: (1) has there been some form of discrimination, *i.e.*, different treatment of similarly situated individuals; (2) was the discrimination based on sex; and (3) if there has been sexual discrimination, is it within the purview of the BFOQ exception and thus lawful).

Not only does Jespersen not fully appreciate the majority's analysis, but she misrepresents it as unsound.

The majority declined to apply *Price Waterhouse* to the instant facts based on the following: (1) *Price Waterhouse* “did not address the specific question of whether an employer can impose sex-differentiated appearance and grooming standards on its male and female employees;” (2) In light of *Price Waterhouse*, this Court’s subsequent cases have not “invalidated the ‘unequal burdens’ test as a means of assessing whether sex-differentiated appearance standards discriminate on the basis of sex;” (3) *Price Waterhouse* has been applied in this Circuit in harassment cases only, which makes it inapposite here; and (4) the majority was bound by precedent. *See Jespersen*, 392 F.3d at 1082-83. Each basis is valid, and demonstrates that the decision is consistent with controlling authority.

At the onset, Jespersen claims that the majority erred by misconstruing *Frank* as an *en banc* decision. This argument is nothing but a “red herring.” The majority merely buttressed its application of *Frank* by stating the obvious, *i.e.*, that it was bound to follow *Frank* – a prior decision of this Court that is germane to the issue and post-dates *Price Waterhouse* by more than a decade. Whether *Frank* is a panel or *en banc* decision is inconsequential, as it is existing precedent that must be followed. *See Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001) (“Once a panel resolves an issue in a precedential opinion, the matter is deemed resolved,

unless overruled by the court itself sitting en banc, or by the Supreme Court. . . . [A] later three-judge panel considering a case that is controlled by the rule announced in an earlier panel’s opinion has no choice but to apply the earlier-adopted rule; it may not any more disregard the earlier panel’s opinion than it may disregard a ruling of the Supreme Court.”)

As to Jespersen’s argument that this Court has not considered the equal burdens test in light of *Price Waterhouse*, not only does *Price Waterhouse* predate *Frank* by more than a decade, this court reiterated the application of the equal burdens test in appearance standards cases in *Nichols v. Azteca Rest. Enter.*, 256 F.3d 864 (9th Cir. 2001). In *Nichols*, this Court found evidence of sex stereotyping in a same-sex sexual harassment case to be evidence of discriminatory intent, and derived the relevance of sex stereotyping from *Price Waterhouse*. However, this Court was careful to limit its holding to harassment cases, and reiterated that not “all gender-based distinctions are actionable under Title VII [including] reasonable regulations that require male and female employees to conform to different dress and grooming standards.” *Id.* at 875 n. 7.

Not only do *Frank* and *Nichols* both post-date *Price Waterhouse*, *Nichols* specifically cites *Price Waterhouse* with approval. See *Nichols*, 256 F.3d at 874-75. Furthermore, in considering gender stereotyping *Frank* and *Nichols* specifically state that reasonable sex-based appearance standards do not constitute

disparate treatment. *See Frank*, 216 F.3d at 854-55; *Nichols*, 256 F.3d at 875 n.7. It is disingenuous to argue that this Court did not intend to give meaning to an exception it carefully created. Jespersen's unpersuasive argument is a mere transition to her true motive, which is to ignore the principle of *stare decisis* and create new law out of "whole cloth."

B. The Unequal Burdens Test is Appropriate

After arguing the unequal burdens test is the applicable test for evaluating gender-specific appearance standards, albeit misapplied, Jespersen argues the unequal burdens test is inappropriate and invalid in light of more recent decisions concerning sex stereotyping, *i.e.*, *Price Waterhouse*. Jespersen's position is confusing and disingenuous because she first claims *Price Waterhouse* is consistent with prior Ninth Circuit decisions, and then claims the two positions are irreconcilable. Jespersen calls the unequal burdens test "anachronistic," "incoherent," and "analytically unsound." Although Jespersen's argument, which calls for a change in the law, is not necessarily relevant to a determination pursuant to FRAP 35, it is addressed below.

The gravamen of Jespersen's claim is her subjective belief that all sex-based distinctions are rooted in gender stereotyping, and are, therefore, illegal. In Jespersen's perfect world, men and women should be treated absolutely the same. **ER at 48-49 (Jespersen Depo., pp. 70:25-71:6).** More specifically, according to

Jespersen if women are required to wear makeup, men should be as well. **ER at 48-49 (Jespersen Depo., pp. 70:25-71:6).** Accordingly, Jespersen’s true motive is to accomplish an expansion of Title VII to eradicate all sex-based distinctions in employment

Essentially, Jespersen has grasped on to *Price Waterhouse*, a 1989 decision by a plurality² of the Supreme Court, which recognized in one of the concurring opinions that gender stereotyping may be evidence of discriminatory intent in gender discrimination cases. *See Price Waterhouse*, 490 U.S. at 251. She takes *Price Waterhouse* to the extreme and advocates a radical change in the law that would create a broad independent cause of action for gender stereotyping under Title VII. Nevertheless, in *Price Waterhouse*, Justice Kennedy (in dissent) pointed out (without opposition) that “Title VII creates no independent course of action for sex stereotyping” *Id.* at 294 (Kennedy, J., dissenting). Certainly, creating a subtype of sex discrimination called “sex stereotyping” would yield unintended results. *See Hamm v. Weyauwega Milk Prods.*, 332 F.3d 1058, 1067 (7th Cir. 2003) (Judge Posner concurring). For example, such a claim would create “a federally protected right for male workers to wear nail polish and dresses and speak in falsetto and mince about in high heels, or for female ditchdiggers to strip to the

² Justice Brennan announced the judgment of the Court and, delivered a concurring opinion, in which Justices Marshall, Blackmon, and Stevens joined; Justices White and O’Connor filed opinions concurring in judgment; and Justice Kennedy filed a dissenting opinion in which Chief Justice Rehnquist and Justice Scalia joined.

waist in hot weather.” *Id.* Although such a proposition may seem extreme, that is exactly what Jespersen advocates when she proposes that there be no gender stereotyping in the workplace, including gender-specific appearance standards.

Price Waterhouse, however, does not stand for the proposition that there can be no gender-specific distinctions in employment. *Price Waterhouse* involved the promotion of a female accountant who was denied partnership because she did not conform to the partners’ expectations of feminine dress and deportment. *See id.* at 235-36. There were numerous examples of stereotypical comments about the female accountant, including descriptions of her as “macho,” in need of “a course in charm school,” “a lady using foul language,” and someone who had been “a tough-talking somewhat masculine hard-nosed manager.” *Id.* at 235. A social psychologist also testified about the causal relationship between the comments and the accountant’s denial of partnership. The employer, nevertheless, argued that the comments were not relied upon in the decision-making process. Consequently, the underlying trial court focused on a mixed-motive analysis. The Supreme Court similarly focused on the burden of proof required in mixed-motive cases. *See id.* at 252. Although Justice Brennan’s plurality opinion acknowledged the “legal relevance” of “sex stereotyping,” it did not clearly address what constitutes stereotyping or how its effects in the workplace may be proven. *See id.* at 251. Justice Kennedy also pointed out (without opposition) that “Title VII creates no

independent cause of action for sex stereotyping” but is relevant to the issue of discriminatory intent. *Id.* at 294 (Kennedy, J., dissenting).

Obviously, this case is very different from *Price Waterhouse* – a case where the plaintiff provided ample evidence of explicit gender stereotyping to demonstrate discriminatory intent. Importantly, the plaintiff in *Price Waterhouse* provided “direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision.” *See id.* at 277 (O’Connor, J., concurring).

In contrast, here, Jespersen’s performance was not evaluated based on an illegal criterion or even a gender stereotype. Rather, she was terminated for not following a company policy regarding appearance that applied to all similarly-situated employees. Harrah’s appearance standard, therefore, does not exclude women from employment, *i.e.*, bartender positions, it excludes employees who choose not to comply with valid company policies. *See, e.g., Barrett v. American Medical Response*, 230 F.Supp. 2d 1160, 1166 (a no beard policy does not discriminate against men, at most, it excludes a subset of men who refuse to shave their beards, which is not gender discrimination). Jespersen, therefore, is not the victim of gender discrimination.

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IV. THERE IS NO QUESTION OF EXCEPTIONAL IMPORTANCE

Finally, Jespersen argues that the majority has created questions of exceptional importance by causing confusion regarding Title VII's protections against sex discrimination. Specifically, Jespersen claims that the law is not clear and that there are inconsistencies in Ninth Circuit *and* Supreme Court decisions regarding sex discrimination. This argument is a mere restatement of what Jespersen has already argued. As to confusion and inconsistency, Jespersen is the one who has created the confusion by making inconsistent arguments about the unequal burdens test. On one hand, Jespersen argues that it applies, and the other she argues that it does not apply. This is a transparent attempt to demonstrate inconsistencies in the law.

The simple fact, however, is that the unequal burdens test is the applicable and appropriate test for evaluating gender-specific appearance standards in employment. This case is an example that the law is clear and consistent, as Jespersen's case has been consistently found to lack evidentiary support.

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V. CONCLUSION

For the foregoing reasons, Harrah's opposes Jespersen's Petition for Rehearing and Rehearing *En Banc*, as Jespersen does not meet the requirements of FRAP 35.

Dated: February 11, 2005

Respectfully submitted,

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No. 03-15045

Heard by Circuit Judges A. Wallace Tashima,
Sidney R. Thomas and Barry G. Silverman.
Opinion by Judge Tashima; Dissent by Judge Thomas.
Filed December 28, 2004.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

DARLENE JESPERSEN,

Plaintiff-Appellant,

v.

HARRAH'S OPERATING COMPANY, INC.,

Defendant-Appellee.

On appeal from the United States District Court
for the District of Nevada
Case No. CV-N-01-0401-ECR (VPC)
The Honorable Edward C. Reed, Jr., District Judge.

**REPLY BRIEF IN SUPPORT OF
PETITION FOR REHEARING AND REHEARING EN BANC**

TABLE OF CONTENTS

	<u>Page</u>
Table of Contents	i
Table of Authorities	ii
I. Introduction	1
II. Argument	2
A. The Panel Majority Opinion Conflicts With Supreme Court, Ninth Circuit and Other Circuit Decisions That Title VII Protects Individuals With A Non-Stereotypical Gender Identity	2
B. By “Declining” To Apply <i>Price Waterhouse</i> To This Directly Analogous Case, The Majority Has Created Conflicts In The Law.	7
C. The Panel Majority Appears To Have Changed The Plaintiff’s Burden Of Production And To Have Imposed an Impossible Burden of Proof	12
III. Conclusion	17
Certificate of Compliance	19
Proof of Service	

TABLE OF AUTHORITIES

	<u>Page</u>
 CASES	
<i>Ballard v. United States</i> 329 U.S. 187 (1946)	7
<i>Burlington Indus., Inc. v. Ellerth</i> , 524 U.S. 742 (1998)	11
<i>Carroll v. Talman Federal Savings and Loan Ass’n</i> , 604 F.2d 1028 (7th Cir. 1979)	<i>passim</i>
<i>City of Los Angeles, Dep’t of Water & Power v. Manhart</i> , 435 U.S. 702 (1978)	8, 9
<i>Diaz v. Pan American World Airways, Inc.</i> , 442 F.2d 385 (5 th Cir. 1971)	6, 8
<i>Faragher v. City of Boca Raton</i> , 524 U.S. 775 (1998)	11
<i>Fountain v. Safeway Stores, Inc.</i> , 555 F.2d 753 (9 th Cir. 1977)	9, 10, 14
<i>Frank v. United Airlines</i> , 216 F.3d 845 (9th Cir. 2000), <i>cert. denied</i> , 532 U.S. 914 (2001)	<i>passim</i>
<i>Frontiero v. Richardson</i> , 411 U.S. 677 (1973)	10
<i>Gerdorf v. Continental Airlines</i> , 692 F.2d 602 (9th Cir. 1982)	<i>passim</i>
<i>Jespersen v. Harrah’s Operating Company, Inc.</i> , 280 F. Supp. 2d 1189 (D. Nev. 2002)	14

<i>Laffey v. Northwest Airlines, Inc.</i> , 366 F.Supp. 763 (D.D.C. 1973)	8
<i>Meritor Savings v. Vinson</i> , 477 U.S. 57 (1986)	11
<i>Mississippi University for Women v. Hogan</i> , 458 U.S. 718 (1982)	6
<i>Nichols v. Azteca Restaurants Enterprises, Inc.</i> , 256 F.3d 864 (9th Cir. 2001)	3, 6
<i>Oncale v. Sundowner Offshore Servs., Inc.</i> , 523 U.S. 75, 80 (1998)	11
<i>Price Waterhouse v. Hopkins</i> , 490 U.S. 228 (1989)	<i>passim</i>
<i>Rene v. MGM Grand Hotel, Inc.</i> , 305 F.3d 1061 (9 th Cir. 2002), <i>cert. denied</i> , 538 U.S. 922 (2003)	4
<i>Schwenk v. Hartford</i> , 204 F.3d 1187 (9th Cir. 2000)	3, 11
<i>Smith v. Salem</i> , 378 F.3d 566 (6 th Cir. 2004)	9

I. INTRODUCTION

Darlene Jespersen maintains that Harrah's Operating Company, Inc. ("Harrah's") violated Title VII when it fired her after twenty years of exceptional service as a casino bartender because she could not continue to perform in her usual exemplary manner while also complying with Harrah's demand that all female bartenders wear a "uniform" of facial makeup every day.¹

Jespersen petitions for rehearing and rehearing en banc of the panel majority's erroneous conclusions (1) that it need not consider here the implications of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and the multiple decisions of this Court forbidding employment discrimination based on gender stereotypes, and (2) that Jespersen lacked sufficient evidence to establish triable factual issues about the makeup policy's discriminatory burdens on her and other women. 392 F.3d 1076, 1081-83; *but see id.* at 1083, 1085-87 (Thomas, J., dissenting).

In this Petition Reply, Jespersen responds to numerous errors and misleading assertions in Harrah's Answer to her rehearing petition. Jespersen also clarifies how the panel majority has created conflict within sex discrimination doctrine (i) by leaving gender nonconforming individuals like herself vulnerable

¹ Harrah's appearance rules, including that female servers be "made over" by a consultant and then recreate that exact look every day, are attached as Exhibit 2 to the Rehearing Petition ("Rhg.Pet."), and discussed at pages 5-6 of Jespersen's Opening Brief on Appeal ("Op.Br."), which is posted for convenience at <www.lambdalegal.org/cgi-bin/iowa/documents/record?record=1614>. Also posted are Jespersen's Reply Brief ("Rep.Br.") and amici briefs of the ACLU of Nevada, et al., and the National Employment Lawyers Ass'n, et al.

to wrongful discrimination; (ii) by improperly “declining” to apply *Price Waterhouse* in this directly analogous case; and (iii) by changing the elements of employment discrimination plaintiffs’ prima facie case, including by requiring those plaintiffs to quantify the absent burdens on male employees in an unprecedented, if not logically impossible, manner. *Id.* at 1081.

Given the serious inconsistencies in the law created by the majority’s decision, and the importance of these issues for workers in all sectors of America’s economy, this Court should grant the Rehearing Petition and set this matter for consideration by the full Court.

II. ARGUMENT

A. The Panel Majority Opinion Conflicts With Supreme Court, Ninth Circuit and Other Circuit Decisions That Title VII Protects Individuals With A Non-Stereotypical Gender Identity.

Darlene Jespersen’s twenty-year track record at Harrah’s proves that a woman can be an exemplary tender of a sports bar – just like her male counterparts – without changing her face to adopt a prescribed feminine look. There is no dispute that the purpose of Harrah’s makeup rule is to force its female employees to conform to a feminine stereotype as a condition of employment. Harrah’s contends, however, that it is privileged to make this demand and that Jespersen’s objection is an improper attempt to impose an androgynous gender identity on her female coworkers. Answer at 3. Of course that is not true. Just as Ann Hopkins

sought to have her work evaluated based on her job performance, not on the extent of her femininity (490 U.S. at 228), and Antonio Sanchez sought to do his job without coworker persecution due to others' views about the proper way men should appear and act (*Nichols v. Azteca Restaurants*, 256 F.3d 864, 874 (9th Cir. 2001)), Jespersen simply seeks to be judged by her effectiveness as a bartender, rather than the fact that she may appear less feminine than some other women.²

As this Court has confirmed, Title VII protects individuals who “fail[] ‘to act like a woman’ – that is, to conform to socially-constructed gender expectations.”” *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000) (construing the Gender Motivated Violence Act). “[U]nder *Price Waterhouse*, ‘sex’ under Title VII encompasses both sex – that is, the biological differences between men and women – *and* gender.” *Id.* at 1202. This Court has underscored that “gender” is not to be understood narrowly to exclude those “who do not

² Throughout its Answer, Harrah’s consistently distorts Jespersen’s position, wrongly attributing to her a “radical” belief that *all* gender-based distinctions among employees must be erased. *See, e.g.*, Answer at 3, 6, 12, 14. Jespersen has never taken that position. To the contrary, in challenging the particular burdensome, sex-based policy based on which she was fired, she contends that Title VII requires Harrah’s to respect the gender diversity among its employees, just as it must respect racial, ethnic and other forms of diversity, and not to impose sex-based rules that subordinate by gender. As she has made explicit in her prior briefing, Jespersen has no quarrel with appearance or conduct rules that differentiate by sex but do not subordinate, demean or limit professional opportunities by sex. *See, e.g.*, Op.Br. at 19-28, 48-51; Rep.Br. at 8-10, 23-29.

conform to socially-prescribed gender expectations.” *Id.* at 1202 n.12.³

Thus, although Ann Hopkins was perceived as “tough-talking [and] somewhat masculine,” Title VII prevented her employers from insisting that she act “more femininely, *wear make-up*, have her hair styled and wear jewelry.” 490 U.S. at 235 (emphasis added). And likewise, when others judged Antonio Sanchez to be insufficiently masculine, the answer was *not* to require him to change his sense of his own masculinity or his expression of it through his appearance and deportment. 256 F.3d at 875.

Jespersen’s deposition testimony made clear that she had a strong adverse reaction to wearing makeup in the amount and style prescribed by Harrah’s consultants. *See* Appellant’s Excerpts of Record (“ER”) 121-22. She wore it in good faith for a few weeks, but it made her feel so awkward, “exposed,” and humiliated that she was unable to work effectively. *Id.* She testified that she felt it invited others to view her as a feminine “sexual object” in a way that was unnerving to her. Although she tried, she was unable to adjust to that gender presentation. *Id.*

³ In *Schwenk*, the plaintiff’s claim “easily survive[d] summary judgment” because she showed that the adverse treatment she had suffered was “motivated, at least in part, by [her] gender – in [that] case, by her assumption of a feminine rather than a masculine appearance or demeanor.” *Id.* at 1202 . *See also Rene v. MGM Grand Hotel*, 305 F.3d 1061, 1069 (9th Cir. 2002) (Pregerson, J., conc.) (explaining that summary judgment in employer’s favor was improper due to unlawful enforcement of gender stereotypes by plaintiff’s coworkers). As Judge Thomas sets forth clearly in his dissent, the same result should have been reached in this case. 392 F.3d at 1086-87.

Harrah's does not dispute that this was a sincere, deeply rooted response on Jespersen's part to a demand she could not accommodate. And, again contrary to Harrah's mischaracterization of her position, Jespersen does not object if other women wish to wear makeup.⁴ Instead, she contends that Harrah's is violating Title VII by restricting employment *only* to women who present an ultra-feminine look, and excluding those who cannot do so without feeling deeply uncomfortable.⁵

At a minimum, Jespersen's testimony showed there are material factual disputes for trial about the two distinct problems Harrah's policy creates. First, as the Supreme Court discussed in *Price Waterhouse*, to insist that women be ultra-feminine when a job requires commanding the respect of customers, creates a "catch 22" that violates Title VII because it impedes their success. 490 U.S. at

⁴ There is no inconsistency between Jespersen's respect for other women's wish to wear makeup and her objection to being required to wear it herself. It is well settled that an employee may object to a sex-based term or condition of employment, whether or not other employees of her "class" share the objection. In *Carroll v. Talman Federal Savings & Loan*, for example, the plaintiff presented a valid *prima facie* case of discrimination with her objection to her employer's policy that all female employees must wear uniforms, when it trusted its male employees to select proper business attire; the Seventh Circuit held that it was irrelevant that other female employees may have liked the uniforms (or, at least, not been willing to risk their jobs by voicing their objections). 604 F.2d 1028, 1031 (7th Cir. 1979) (opinion cited with approval by *Frank v. United Airlines, Inc.*, 216 F.3d 845, 855 (9th Cir. 2000); *Gerdorn v. Continental Airlines*, 692 F.2d 602, 606 (9th Cir. 1982) (en banc); and the panel majority in this case, 392 F.3d at 1080).

⁵ The Title VII violation inherent in Harrah's policy should be even more obvious for bartending and other jobs traditionally restricted to men, for whom a "feminine look" manifestly is not a bona fide occupational qualification ("BFOQ").

251.⁶ Separately, to require women to present themselves in an ultra-feminine manner when femininity is not BFOQ violates Title VII because it precludes employment of women who express their gender in a way that is less stereotypically feminine. *See Nichols*, 256 F.3d at 875; *Rene*, 305 F.3d at 1069.⁷

Harrah's seeks to sow confusion by continuing to describe its policy inaccurately. For example, its Answer reiterates its misleadingly assertion that its male servers must be clean shaven. In fact, the policy contains no such restriction. Harrah's men are free to wear any style of facial hair, or none at all, as long as they are clean and tidy. *See Rhg.Pet. Exh. 2*. Just as in *Carroll v. Talman Savings*, 604 F.2d at 1031, Harrah's deems men capable of making mature decisions about their professional appearance, while women must wear a facial "uniform" dictated by their employer. Title VII does not permit this demeaning

⁶ By analogy, consider a rule requiring female workers to wear a prescribed "feminine" perfume. Some may like it; others may find it annoying or humiliating. But if customers are less likely to take seriously and follow instructions from an employee wearing a floral scent – whether she is an accounts manager or a bartender – the women employees will have difficulty succeeding.

⁷ Were this case to proceed to Harrah's claimed BFOQ defense, it would be easy to see that certain jobs call for sex-specific costumes and job duties that Jespersen might find humiliating. Her appearance and way of expressing her female identity probably would disqualify her from being cast as a female ingenue in a play or being hired as a dancer in a "gentleman's club." But Harrah's beverage servers' duties are not gender-specific, and, under longstanding employment discrimination precedents, they cannot be. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (men cannot be excluded from nursing profession); *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971) (airline may not segregate "stewardess" and "purser" jobs by sex). Harrah's version of the legal test notwithstanding (*see Answer at 8-9*), the burden thus *should* be on Harrah's to show why its drink servers must conform to gender stereotypes.

message, and the resulting subordination of women workers.

B. By “Declining” To Apply *Price Waterhouse* To This Directly Analogous Case, The Majority Has Created Conflicts In The Law.

Harrah’s begins its Answer by quoting from the Supreme Court’s 1946 decision in *Ballard v. United States*, in which the Court held that exclusion of women from jury service is unconstitutional. 329 U.S. 187. The *Ballard* Court’s observation that men and women are not “fungible” for purposes of determining that men cannot “represent” women in this function was a new idea at that time; indeed, the federal courts in California had ended such exclusions only two years before. 329 U.S. at 197 (Frankfurter, J., conc.). Harrah’s does not explain how it believes the *Ballard* Court’s half-century old observation applies in this case. And it seems an odd logic to argue that, because women must be included in juries due to the value of diversity, they can be fired for not maintaining a dictated feminine look while tending bar. Harrah’s quotation may be best understood as reflecting the era of its worldview. For Harrah’s belief that it can fire women – including those who work in male-dominated jobs – for not looking uniformly feminine, does seem to date not just from before the *Price Waterhouse* decision, but from before Title VII existed at all, when society did not protect working women from arbitrary sex discrimination.

Like Harrah’s apparent wish to turn the clock back to the time when much

in society was segregated by sex, the panel majority also was misguided in “declining” to apply controlling Supreme Court precedent. In *Price Waterhouse*, the high court construed the plain text of Title VII and confirmed that employers may take employees’ gender into account *only* “when gender is a ‘bona fide occupational qualification [(BFOQ)] reasonably necessary to the normal operation of th[e] particular business or enterprise.’ ... *In all other circumstances, a person’s gender may not be considered in making decisions that affect her.*” 490 U.S. 228, 242 (1989) (citation omitted) (emphasis added). Thus, despite Harrah’s argument to the contrary (Answer at 8-9), the casino should have the burden to justify its policy by showing why makeup is a BFOQ for its female employees (as the airlines unsuccessfully attempted to do in numerous similar cases).⁸

Price Waterhouse highlighted another key premises of Title VII law – that it protects individuals, not classes. *Id.* at 288; *see also Manhart*, 435 U.S. at 708. The Supreme Court recognized early “that employment decisions cannot be predicated on mere ‘stereotyped’ impressions about the characteristics of males or females.” *Manhart*, 435 U.S. at 707. Consequently, the law secures each person’s right to be evaluated based on quality of work rather than characteristics that often correlate to irrational assumptions about groups. Yet, the makeup rule at issue

⁸ E.g., *Frank*, 216 F.3d at 845; *Gerdorf*, 692 F.2d at 602; *Diaz v. Pan Am World Airways*, 442 F.2d 385 (5th Cir.1971); *Laffey v. Northwest Airlines*, 366 F.Supp. 763 (D.D.C. 1973).

here seems based on precisely such “stereotyped impressions” in that, for example, Harrah’s claims makeup is de rigeur for women due to the effects of casino lighting on employees’ faces, but fails to explain how those effects possibly can vary by sex. *See* Marden Decl., ¶4, ER at 38; Op.Br. at 32-33; Rep.Br. at 19.

The *Manhart* decision noted that Title VII’s “simple test” inquires “whether the evidence shows ‘treatment of a person in a manner which but for that person’s sex would be different.’” 435 U.S. at 711. The Supreme Court applied that same test to a similar end in *Price Waterhouse*.⁹ It should be obvious that Harrah’s policy fails, too, because there is no dispute that, were Jespersen male, she still would be receiving effusive praise from contented guests at Harrah’s Sports Bar.

The panel majority did not find it obvious, however, because years ago, this Court followed a judge-made exception to this “simple test” in order to reject “counter culture” challenges brought by men to rules that demanded conformity with “establishment” expectations regarding male grooming. *See, e.g., Fountain v. Safeway Stores, Inc.*, 555 F.2d 753 (9th Cir. 1977). Rather than devise a sex discrimination principle to distinguish between policies that subordinate or demean by gender and those that do not, and although nothing in the statute’s text

⁹ *Accord Smith v. Salem*, 2004 WL 1191073, *7 (6th Cir. 2004) (pointing out that, “After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim’s sex.”).

supports it, the lower courts exempted all sex-based appearance rules that make different demands of women and men, as long as they do not burden “unequally.” *See, e.g., id.*; *see also Gerdom*, 692 F.2d at 608. The cases never have explained how to weigh the relative “burdens” of gender stereotypes. Nor have they justified their deviation from the usual rule that workers are to be protected from employer-imposed stereotypes, rather than required to conform to them “equally” according to their group membership.

Although the Supreme Court has flagged the problem of sex stereotypes throughout its Title VII jurisprudence (*see, e.g., Frontiero v. Richardson*, 411 U.S. 677 (1973)), this Court’s “equal burdens” test dates from before the high court confirmed in *Price Waterhouse* that requiring employees to conform to gender stereotypes in their appearance and deportment poses precisely the same problem as stereotypes about aptitude for particular jobs or social roles. *See, e.g., Gerdom*, 692 F.2d at 602; *Fountain*, 555 F.2d at 753. In the main Ninth Circuit “dress code” case since *Price Waterhouse*, the Court did not need to consider *Price Waterhouse*’s implications for the “equal burdens” test because United Airlines’ rule that female flight attendants had to be disproportionately thinner than males failed that test without more. *Frank*, 216 F.2d at 845. But when the panel majority applied the “equal burdens” test to Harrah’s policy and concluded (erroneously) that no reasonable jury could find it burdens women more than men,

the majority then should have stepped directly to the question left unaddressed in *Frank* – whether this test can survive post-*Price Waterhouse* without modification.

As the dissent explains, the majority’s decision to “decline” to follow *Price Waterhouse* is not justified by the fact that this is not a harassment case. 392 F.3d at 1084-85.¹⁰ The majority also demurred that prior decisions of this Court have tied its hands. *Id.* at 1083. If the majority were correct that prior Ninth Circuit dicta precludes it from considering the key questions presented on this appeal, that certainly would be all the more reason en banc review is warranted here.¹¹

¹⁰ Indeed, as the dissent points out, the majority’s observation that this is not a harassment case explains nothing, since it is long settled that harassment is merely one form of discrimination. *Id.* (discussing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998); see also *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 753-54 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998); *Meritor Savings v. Vinson*, 477 U.S. 57, 65-66 (1986) (Rhenquist, J.). As the dissent explains, the majority appears erroneously to conflate two separate Title VII questions – whether the adverse treatment of the plaintiff was severe enough to be actionable, and whether the motive for the adverse treatment was impermissible. Here, just like in *Price Waterhouse*, there is no question that the treatment of the plaintiff was sufficiently severe to be actionable (in this case, termination; in *Price Waterhouse*, denial of a promotion). As to the second question, it is undisputed that she was fired due to “her assumption of a [masculine] rather than a [feminine] appearance.” See *Schwenk*, at 1212; see also Dissent, 392 F.3d at 1084; *Ellerth*, 524 U.S. at 761 (cognizable employment actions include firing, failing to promote, reassignment with significantly different responsibilities, and material decreases in benefits). Thus, despite Harrah’s mischaracterization of her position (see Answer at 6), Jespersen never has contended Title VII permits an independent claim for gender stereotyping; rather, she has sued Harrah’s for firing her because it did so based on her gender.

¹¹ Harrah’s rejoinder that the *Frank* decision – whether it was by a three-judge or an en banc panel – was decided correctly, is beside the point. Neither *Frank* nor *Gedom* addressed whether an employer can require its employees to conform to stereotypes as a condition of their jobs. Because this Court found the differential weight rules in those cases to violate Title VII without needing to answer the gender conformity question, neither decision provides the rule for decision needed here.

C. The Panel Majority Appears To Have Changed The Plaintiff's Burden Of Production And To Have Imposed an Impossible Burden of Proof.

The panel majority appears to have changed the elements of employment discrimination plaintiffs' prima facie case. Until the panel majority's decision, the law was clear that "the plaintiff has the initial burden of producing sufficient evidence of discriminatory treatment, a burden which is not onerous. The burden of production then shifts to the defendant." *Gedrom*, 692 F.2d at 608.

As the dissent points out, Jespersen produced ample evidence to shift the burden. 392 F.3d at 1086-87. Her evidence that she was an exemplary employee for two decades without wearing makeup is undisputed. It also is undisputed that she was fired because she did not comply with her employer's demand that she appear more feminine. The terms of Harrah's policy are undisputed as well. Lastly, Harrah's does not dispute Jespersen's testimony about the impact of the makeup rule on her, including that she felt humiliated to have to make herself look "prettier" and more like "a sexual object" in order to keep her job. ER at 121-22. The majority erred in finding all this evidence insufficient to shift the burden of production to Harrah's, and the implications for future cases are very troubling.

Indeed, in numerous ways, the majority's analysis creates conflict with this Court's prior "appearance code" decisions in which an employer's policy itself was taken as the principal evidence to be tested by Title VII. *See, e.g., Frank*, 216

F.3d at 845; *Gerdorn*, 692 F.2d at 602. In *Gerdorn*, for example, “facial examination of the weight program here reveals that it is designed to apply only to females.” 692 F.2d at 608. From Continental’s policy itself, the Court saw that the requirement was “disparate treatment ... demeaning to women ... based on offensive stereotypes prohibited by Title VII.” *Id.* at 606. This Court then concluded, “[b]ecause [the employer]’s facially discriminatory policy itself supplies the requisite elements of a prima facie case, we must look to [the employer]’s efforts to rebut it.” *Id.* at 608.¹²

As in all those cases, Jespersen submitted ample evidence that Harrah’s policy imposes greater burdens on female bartenders, to show that the relative burdens on men and women at least is a disputed question of material fact. The policy terms for women are twice as lengthy as those for men. Based on their common experience in the world, members of a reasonable jury easily could conclude that women bear greater burdens from their daily makeup regime (with no corollary for men).¹³

¹² Similarly, in *Carroll*, which the panel majority and the *Frank* and *Gerdorn* courts all have cited with approval, the Seventh Circuit needed little more than to review the defendant’s policy to discern its stereotype-based, “demeaning” judgment that it could trust its male employees but not its female employees to select proper business attire. 604 F.2d at 1032-33.

¹³ Likewise, if the overall appearance requirements are to be considered, a reasonable jury could find more burdensome the daily hair “teasing, curling, or styling” duty imposed on women (where men simply cannot grow their hair long). Certainly given *both* the more elaborate daily make-up and hair requirements for women, a jury reasonably could find a greater burden on women. On this point, Harrah’s argument is peculiar because it proclaims that “it is self-evident

Moreover, in addition to the policy itself, Jespersen's prima facie case also included her testimony about the negative impacts on her of the policy, including that it interfered with her ability to do her job. In both *Gerdorn* and *Frank*, the affected plaintiffs' testimony about the harmful effects *on them* of their employers' appearance rules was the principle evidence in addition to the policy itself. Harrah's mistakenly contends that Jespersen's testimony about the "intangible" burdens on her of a requirement that she experiences as demeaning is insufficient. But, as *Frank*, *Gerdorn* and *Carroll* all make clear, this is not correct.¹⁴

that in the context of gender-specific appearance standards the courts must be given latitude to weigh the relative burdens it imposed on each sex." Answer at 8. As the dissent explains, however, what those relative burdens may be is a factual dispute that should not have been resolved by summary judgment. This is especially evident given Jespersen's testimony regarding the burdens on her and what experience and common sense teach about the burdens of having to buy, put on, and remove make-up daily, as opposed to not doing so.

But beyond the obvious factual disputes about the burdens imposed by other features of Harrah's policy, it must be noted that *no* prior decisions support the majority's holdings (1) that sex discrimination plaintiffs must challenge their employers' policies as a whole (with specific evidence about how each element affects men as well as women), and (2) that discrimination against women in one element of an employer's policy may be offset by an unrelated restriction on men. This Court's analysis in other cases, to the contrary, has been that female employees can challenge the one feature of their employer's policy that causes them a problem, without needing to consider the employer's other rules. In fact, the *Gerdorn* court specifically rejected the airlines' attempt to excuse itself this way. 692 F.2d at 606-07 (discussing "harmful effects of occupational cliches" and noting that airline's discrimination against men did not mitigate its different discrimination against women).

¹⁴ Such evidence of "intangible" dignitary harm distinguishes cases like *Carroll* and this case from those addressing requirements that male employees keep their hair short and wear ties, or even the district court's hypothetical that there may be male employees at Harrah's who wish to wear facial makeup. See, e.g., *Fountain*, 555 F.2d at 753; *Jespersen v. Harrah's Operating Co.*, 280 F.Supp.2d 1189, 1193 (D.Nev. 2002). Unlike the policy at issue in this case, such restrictions on men cannot be said to subordinate them professionally, or to impede their chances at professional success, in the way the uniform requirement in *Carroll* and the makeup, jewelry and "soft-hued suits" requirement in *Price Waterhouse* were recognized as doing for women.

As yet further evidence, judicial notice can be taken of the fact that – whatever their actual amounts – the cost and time required to buy and apply makeup necessarily are greater than the nonexistent amounts expended by men to not do so. Indeed, it is well-settled that litigants need not introduce evidence to prove matters within the general knowledge of the jury.

The panel opinion created yet further conflict with the prior decisions by holding that Jespersen had to submit evidence not only quantifying the burdens on women that men do not bear, but also somehow quantifying the benefit to men of being free of those burdens. *None* of the cases applying this Court’s “unequal burdens” test requires evidence quantifying the non-existent burdens on the favored class. For example, in neither *Frank* nor *Gerdorn* did the Court require plaintiffs to produce evidence confirming that their male coworkers enjoyed their freedom to weigh proportionally more, let alone quantifying their happiness.¹⁵ Likewise, in *Carroll*, the female plaintiffs were not required to submit evidence confirming – let alone quantifying how much – that male employees enjoyed their greater professional dignity from their freedom to wear attire of their choice rather than uniforms. Indeed, it is difficult to imagine how such an evidentiary

¹⁵ In fact, in *Gerdorn*, the Court actually held to the contrary that discrimination of a different sort against men did *not* offset or excuse the discrimination against women, and also that female employees may challenge restrictions imposed only upon them without needing evidence about male employees who are exempt. 692 F.2d at 607-08.

requirement ever could be met. But clearly, had such a requirement been imposed in the prior cases, all would have come out the other way.

As in those cases, the disparate treatment of women is manifest in Harrah's policy. As explained in the dissenting panel opinion, at a minimum there is a triable issue regarding the relative burdens on women and men from the cost and time required of women to comply with Harrah's requirements, as well as from the subordinating message that women do not look professional unless they alter their appearance, and that they cannot be trusted to present themselves professionally without a "uniform" designed by someone else, just like the similarly "demeaning" message found discriminatory in *Carroll*.¹⁶

In sum, the panel majority has deviated from the prior case law, without justification. Its holding that Jespersen submitted insufficient evidence means that plaintiffs now are subject to a new, difficult, and unjustified standard of proof. This new standard is likely to create confusion for employees, employers and courts alike. It will make it harder for employees to enforce Title VII's protections, and probably will cause an increase in discrimination. These

¹⁶ In fact, in *Gerdorn*, evidence similar to what Jespersen has submitted was enough for this Court not only to reverse the summary judgment order against the female plaintiffs, but to grant their cross motion for summary judgment. 692 F.2d at 605. Had Jespersen so moved in this case, Harrah's minimal "business necessity" evidence would not have justified the facial discrimination of this policy. See the discussion in Jespersen's Opening Brief at 29-35 and Reply Brief at 18-20, both of which are posted at <www.lambdalegal.org/cgi-bin/iowa/documents/record?record=1614>.

conflicts with prior law warrant rehearing of this case by the full Court.

III. CONCLUSION

Twenty-five years ago, the Seventh Circuit panel majority in *Carroll v. Talman Savings* chided the dissent for deeming too trivial to be actionable the bank's requirement that its women employees – and only its women employees – wear uniforms. In the well-chosen words of the majority, “with all due respect for the views of a valued colleague, [the] dissenting opinion favors affirmance mainly because the sex discrimination here is not blatant. However, [Title VII] prohibits any sex discrimination with respect to compensation, terms, conditions, or privileges of employment.” 604 F.2d at 1033.

If anything, this principle applies with even greater force in the present case, in which one hard-working woman bartender has sought to maintain her dignity and her job in the face of a policy imposed by one of the largest, wealthiest employers not only in Nevada, but nationwide. As Judge Thomas has explained in his dissenting opinion, the panel majority's analysis should be reconsidered. Darlene Jespersen should have the chance to present her case to a jury.

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For the foregoing reasons, Plaintiff-Appellant Darlene Jespersen respectfully requests that this Court grant her petition for rehearing and rehearing en banc.

DATE: March 7, 2005

Respectfully submitted,

LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.

By: 
Jennifer C. Pizer

ATTORNEYS FOR PLAINTIFF-APPELLANT
DARLENE JESPERSEN

CERTIFICATE OF COMPLIANCE

The accompanying Reply Brief in Support of Petition for Rehearing and Rehearing En Banc of Appellant Darlene Jespersen complies with the specifications of Rule 32 of the Federal Rules of Appellate Procedure, as follows:

1. The text of the Brief is double spaced. Headings, footnotes, and most quotations of more than two lines are single spaced.
2. The Brief is proportionately spaced. The typeface is Times New Roman in 14 point size.
3. The word count of the Brief is 5,034 words, based on the count of the word processing system used to prepare the Brief.

I certify that the foregoing is true and correct. Dated this 7th day of March, 2005 at Los Angeles, California.


Jennifer C. Pizer

PROOF OF SERVICE BY U.S. MAIL

I, TITO GOMEZ, declare:

That I am a resident of the County of Los Angeles, California; that I am over eighteen (18) years of age and not a party to this action; that I am employed in the County of Los Angeles, California; and that my business address is 3325 Wilshire Blvd., Suite 1300, Los Angeles, CA 90010.

On March 7, 2005, I served a copy of the attached documents, described as **MOTION FOR LEAVE TO FILE REPLY BRIEF IN SUPPORT OF PETITION FOR REHEARING AND REHEARING EN BANC; REPLY BRIEF IN SUPPORT OF PETITION FOR REHEARING EN BANC**, by U.S. Mail, on the parties of record by placing true and correct copies thereof in sealed envelopes, with first-class postage thereon fully prepaid, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: March 7, 2005



Tito Gomez